(4)

No. 05-1126

IN THE

Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.,
Petitioners,

v.

WILLIAM TWOMBLY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICI CURIAE E.I. DU PONT DE NEMOURS AND COMPANY AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF BELL ATLANTIC CORPORATION, ET AL.'S PETITION FOR A WRIT OF CERTIORARI

DONALD C. KLAWITER
Counsel of Record
J. CLAYTON EVERETT, JR.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000

Counsel for Amici Curiae

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(additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

THOMAS L. SAGER
Vice President, Assistant General Counsel and Director of Litigation
RAYMOND M. RIPPLE
E.I. du Pont de Nemours and Co.
1007Market St.
Wilmington, DE 19898

Counsel for Amicus Curiae
E.I. du Pont de Nemours and Co.

QUENTIN RIEGEL
Vice President Litigation & Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., NW, 6th Floor
Washington, DC 20004

Counsel for Amicus Curiae
National Association of Manufacturers

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STATEMENT OF INTEREST

E.I. du Pont de Nemours and Company ("DuPont") is one of the largest and most diverse manufacturing firms in the world. The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. Collectively, *amici* and their members produce thousands of different products in

hundreds of different markets throughout the United States and around the world.

In some of these markets, there may be only a few significant competitors producing, marketing or selling competing products. In such markets, similar external factors often drive strategic decisions. Consequently, it is not unusual for all or most market participants to make similar independent decisions regarding competitive issues.

The Second Circuit's holding that antitrust plaintiffs need not plead "plus factors" in order to state a claim under Section 1 of the Sherman Act based on parallel conduct increases the risk of groundless, but nonetheless tremendously expensive, antitrust suits against multi-product and multinational companies, such as DuPont, and others that operate in competitive markets. More specifically, the decision below threatens to subject *amici*, and companies like them, to extremely expensive and burdensome discovery based solely on allegations of parallel conduct, despite the fact that parallel conduct is insufficient, standing alone, to ever establish antitrust liability. Defendants in such cases are put in a no-win situation. Even if the claims against them lack merit under governing antitrust precedent, they must either incur the tremendous expense of defending an antitrust lawsuit or settle the case to avoid this expense and potential harm to their reputation. Many, unfortunately, submit to the economic pressures and make what many see as the common sense decision to settle such lawsuits.

The petition raises important issues affecting wide segments of American industry. DuPont and NAM respectfully request the Court to grant the petition for a writ of certiorari in this case.[1]

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[1] DuPont and NAM sought and received consent from all parties to file this brief in support of the petition for certiorari in this case, and those consents are on file with the Clerk. No party authored this brief in whole

PRELIMINARY STATEMENT

Although the Second Circuit's decision may appear at first blush to decide a dry procedural issue about pleading standards, it, in fact, threatens to undo much of the work of this Court and of the courts of appeal over the last thirty years in developing an effective antitrust law that promotes rather than impedes competition.

In order to assure that legitimate procompetitive conduct is not deterred, it is extremely important to differentiate the independent decisions of single firms—which are presumptively procompetitive—from agreements between horizontal competitors—which are inherently suspect and often illegal. It is for that reason that the antitrust laws require proof of so-called "plus factors" that tend to "exclude the possibility of independent action" as a basis for antitrust liability predicated on parallel conduct. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Penalizing parallel conduct in the absence of such "plus factors" threatens to "deter or penalize perfectly legitimate conduct." *Id.* Such conduct is the result of self-interested, independent decision making and, therefore, is perfectly legitimate and competitively beneficial.

As other Circuits have recognized, concerns about deterring procompetitive business conduct apply with as much force at the pleading stage as they do at later stages of the litigation process.[2] By opening the door to full scale

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or in part, and no one other than *amici* and their members contributed financially to the preparation of this brief.

[2] *See Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989) (requiring "plus factors" to be pleaded in support of a conscious parallelism claim); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 475 (6th Cir. 2005) (requiring allegations of "plus factors" in antitrust conspiracy case); *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999) (requiring allegations of "plus factors" or other facts in support of antitrust conspiracy claim).

antitrust discovery based solely on allegations of parallel conduct, the Second Circuit's standard threatens to penalize firms for engaging in perfectly legitimate conduct (a) that is common and inevitable in many markets, (b) that is expressly appropriate under relevant antitrust jurisprudence and (c) that benefits consumers.

Robust pleadings standards are thus particularly important in complex antitrust cases. Because of the enormous costs and burdens associated with discovery in antitrust litigation, the pleading standard adopted by the Second Circuit in this case creates incentives for firms to forego making procompetitive, profit maximizing business decisions based on concerns about antitrust litigation. Even claims that have a very low probability of success often lead to "hold up" settlements based on litigation costs instead of the merits of the underlying claims. Such settlements benefit only a small handful of plaintiffs and their counsel, at the expense of the federal court system and consumers in general. Although the pleading standards of the Federal Rules of Civil Procedure are intended to be liberal, they are also intended to serve at least some gatekeeper role, separating legitimate claims from those that have no prospect of success. The standard applied by the Second Circuit in this case, however, abdicates that role. It permits claims to proceed on the basis of alleged facts that, even if proved, would be insufficient to establish a basis for relief under the Sherman Act.

Review by this Court is necessary to reverse the Second Circuit's error, to resolve the split among the Circuits regarding pleading standards for antitrust claims based on "conscious parallelism," and to avoid flooding the federal courts with antitrust suits challenging lawful parallel conduct.

DISCUSSION

Although characterized as only a procedural issue of pleading requirements, this case has major impacts and costs on the parties to antitrust litigation. The Second Circuit's opinion opens the floodgates to full scale "fishing expedition" discovery in cases involving conduct that is explicitly permissible under governing precedent from this Court. Once they survive a motion to dismiss under Rule 12(b)(6), antitrust plaintiffs are permitted to impose enormous discovery burdens and costs on defendants—a penalty far in excess of many judgments.

Subsequent substantive screens at the summary judgment and trial stages cannot remedy the huge costs imposed during the discovery phase. Even for a moderate sized antitrust case, such costs will be several million dollars. Plaintiffs must be required to plead sufficient facts to differentiate legitimate "conscious parallelism" from illegitimate horizontal agreements in restraint of trade.

I. THE SECOND CIRCUIT'S STANDARD CREATES AN OPEN INVITATION TO FILE UNMERITORIOUS ANTITRUST SUITS CHALLENGING PROCOMPETITIVE "PARALLEL CONDUCT."

According to the Second Circuit, an antitrust conspiracy complaint is sufficiently stated if it alleges (1) that the defendants made similar parallel business decisions and (2) that those decisions were part of a "conspiracy." Because allegations of "conspiracy" are legal conclusions that need not be credited at the pleading stage,[3] however, the Second

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[3] *See Mid-America Reg'l Bargaining Ass'n v. Will County Carpenters District Council*, 675 F.2d 881, 886 (7th Cir. 1981) ("Mere 'conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss.'") (quoting *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981)); *TV Communications Network, In. v. ESPN,*

Circuit's decision effectively stands for the proposition that parallel conduct, standing alone, provides sufficient grounds for an antitrust complaint—and for full scale antitrust discovery.

Yet, this Court and several federal appellate courts have long held that "parallel conduct" is often legitimate and proper competitive behavior. Market participants faced with similar competitive threats, sources of raw material supply or market conditions and presented with similar information regularly act in a similar manner. In many industries, similar external supply and demand factors may lead firms independently to make similar decisions regarding pricing or supply.

At the same time, in markets with relatively few participants, the same business opportunity may simultaneously be presented to multiple different competitors. Some or all of those competitors may have independent business reasons for declining that opportunity—due to capital requirements, risk profiles, competing investment opportunities and other factors.

Under this Court's precedents, such "parallel conduct," standing alone, is insufficient to establish an antitrust violation.[4] A plaintiff's ability to prove the existence of at

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Inc., 767 F.Supp. 1062, 1070 (D. Colo. 1991) (In reviewing a motion to dismiss, the court stated that "fleeting and conclusory allusions to conspiracies are simply insufficient as a matter of law.") (quoting *Sims v. Mack Truck Corp.*, 488 F.Supp. 592, 607 (E.D.Pa.1980)).

[4] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)("conscious parallelism, ... [is] not in itself unlawful, [even though, the] firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions."); *Theatre Enters, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954) ("[C]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward

least one "plus factor" is a necessary precondition to liability in a conscious parallelism case.[5] Thus, plus factors must be alleged to satisfy the notice pleading requirements of Rule 8 and to avoid dismissal under Rule 12(b)(6).[6] No higher, or heightened, pleading requirements are necessary to exclude complaints alleging solely that defendants engaged in "consciously parallel" conduct.[7]

By allowing this case to proceed to discovery despite the absence of "plus factor" allegations, the Second Circuit effectively lowered the pleading standard for antitrust cases challenging parallel conduct. This is an open invitation for meritless suits brought to extract "hold up" settlements rather than to vindicate rights protected by the antitrust laws. Antitrust plaintiffs can impose huge discovery costs on defendant companies simply by alleging conduct that is common, perfectly legal and often procompetitive. These

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conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.").

[5] *See, e.g., In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004) ("[W]e have required that plaintiffs basing a claim of collusion on inferences from consciously parallel behavior show that certain "plus factors" also exist.); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000) ("An agreement is properly inferred from conscious parallelism only when certain "plus factors" exist."); VI Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* § 1433 (e) (2002) (The term "plus factors" refers to "the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy.").

[6] *See, e.g., Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 348 (4th Cir. 2005) ("[A] complaint meets Rule 8's requirements if, in light of the nature of the action, the complaint sufficiently alleges each element of the cause of action so as to inform the opposing party of the claim and its general basis."); *Carl Sandburg Vill. Condo. Assoc. No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 207 (7th Cir.1985) ("[T]o survive a motion to dismiss a complaint must state either direct or inferential allegations concerning all of the material elements necessary for recovery....").

[7] Thus, the Second Circuit's reliance on *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), is misplaced.

discovery costs, as discussed further below, are often greater than actual recoveries, even in cases that have some ultimate merit under governing antitrust precedent. Without robust pleadings standards to separate the wheat from the chaff – as "plus factors" are intended ultimately to do – there is nothing to dissuade the filing of antitrust suits based solely on the thin – and legally untenable – reed of perceived parallel behavior.

II. ROBUST PLEADING STANDARDS ARE PARTICULARLY NECESSARY IN COMPLEX ANTITRUST CASES.

Antitrust cases are notoriously burdensome and expensive to litigate.[8] Antitrust cases, and particularly antitrust *conspiracy* cases under Section 1 of the Sherman Act, generally require a searching evaluation of all aspects of the market at issue to determine whether competition in that market has been undermined or distorted by the conduct challenged in the suit. Thus, under the broad terms of Federal Rule of Civil Procedure 26, a huge array of documents, in electronic or hard-copy format, relating to pricing, product quality, product initiatives, marketing, sales, labor and union issues, budgets and other financial information, board materials, and many others are commonly discoverable.

Discovery often also extends to documents relating to the personal schedules, calendars, and communications of company executives, officials, directors, and sales and marketing employees as these documents may be used as evidence of communications with competitors. In the age of

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[8] *See generally Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures*, 80 F.R.D. 509 (1979); *Recommendations of the American College of Trial Lawyers on Major Issues Affecting Complex Litigation*, 90 F.R.D. 207 (1981); Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 Harv. L. Rev. 27 (1950).

e-mail, virtually every e-mail message of every mid-level and senior manager is at the center of the discovery process. In essence, antitrust defendants must open and produce virtually all of their files relating to the market at issue in order to comply with the mandates of Rule 26(b)(1) that allows discovery of all information relevant to a claim or defense of any party that is "reasonably calculated to lead to the discovery of admissible evidence."[9] Meanwhile, civil antitrust plaintiffs often have little incentive to limit discovery demands because the volume of documents in their possession related to the litigation and, therefore, potentially subject to retaliatory document requests by the defendants, is *de minimis*.[10]

The defendant's employees, including mid-level and senior managers, also must submit to time-consuming and costly depositions where they may be questioned at length about their e-mail files or their business operations. This process can be a major distraction to the company's ongoing business operations. With the advent of electronic discovery, the costs of antitrust litigation have increased dramatically in

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[9] *See, e.g., FTC v. Lukens Steel Co.*, 444 F. Supp. 803, 805 (D.D.C. 1977) ("The discovery rules should normally be liberally construed ... in antitrust cases."); *Kellam Energy, Inc. v. Duncan*, 616 F.Supp. 215, 217 (D. Del. 1985)("[T]here is a general policy of allowing liberal discovery in antitrust cases ... [p]articularly where allegations of conspiracy or monopolization are involved."); *In re Microcrystalline Cellulose Antitrust Litig.*, 221 F.R.D. 428, 430 (E.D. Pa. 2004) ("[S]ome courts have also held that a broad scope of discovery is particularly appropriate in antitrust litigation because, for example, relevant business documents pertaining to the antitrust conspiracy may not exist and covert behavior may have to be proven through less direct means.").

[10] *See* William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887 (2003) (Wagener lists the substantial asymmetry of discovery costs in civil antitrust cases as one factor which makes such cases particularly susceptible to abuse by opportunistic plaintiffs.)

recent years, as have the costs of economic experts who are regularly required in antitrust conspiracy litigation.[11]

The U.S. District Court for the Southern District of New York estimated in a recent antitrust case that the cost of producing electronic discovery—only a *portion* of the discovery "pie"—would run nearly $10 million dollars. *See Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 425 (S.D.N.Y. 2002). In *Murphy Oil USA v. Fluor Daniel, Inc.*, No. 99-3564, 2002 WL 246439 (E.D. La. Feb. 19, 2002), the defendant's estimated cost to restore and print responsive e-mail from 93 backup tapes using procedures which the court recognized as bearing some similarity to those described in *Rowe* exceeded $6 million. In many cases, the costs of discovery in antitrust cases far exceed the costs of verdicts or settlements in those cases.[12]

As a result, there is tremendous pressure to settle antitrust cases that are able to surmount the initial pleading hurdle.[13]

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[11] Even prior to the advent of e-mail in the corporate workplace, antitrust discovery was extraordinarily far-reaching. Even in the 1970s, for instance, IBM produced over 1300 witnesses for deposition and 31 million pages of documents in response to antitrust suits challenging its business practices that arose out of a single government investigation. *See* Peter M. Gerhart, *Report on the Empirical Case Studies Project to the national Commission for the Review of Antitrust Laws and Procedures, in 2 Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures* at 21-22 (Jan. 22, 1979) (hereinafter "Empirical Case Studies Project").

[12] *See also In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-C897, 1995 U.S. Dist. LEXIS 8281, at *2 (N.D. Ill. June 13, 1995) (ordering compilation and review of 30 million pages of e-mail); *In re Linerboard Antitrust Litig.*, 296 F.Supp.2d 568, 577 (E.D. Pa. 2003) (pretrial discovery required production of millions of pages of documents). *Empirical Case Studies Project* at 19-21 (identifying additional antitrust cases where participants reported producing "millions" of pages of documents and witnesses for hundreds of deposition days).

[13] Steven C. Salop, Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1011 (1986).

Antitrust settlements are often driven more by avoiding the costs of further litigation and the time expended in its preparation than by the merits of the claims at issue.

The undesirable effect of allowing meritless claims to proceed through the judicial system has been of grave concern to this Court. *See, e.g., Monsanto*, 465 U.S. at 763-64. To avoid this adverse outcome, courts must be permitted to dismiss, prior to the discovery stage, claims that fail to allege the elements this Court has required plaintiffs to prove in order to succeed at trial or withstand a summary judgment motion.

In *Blue Chip Stamps v. Manor Drug Stores*, this Court recognized this potential for abuse, concluded that the avoidance of nuisance and harassment suits is a legitimate and important concern at the pleading stage, at least in complex cases, and noted with approval the use of motions to dismiss to address such concerns. 421 U.S. 723, 739-43 (1975). It recognized that, in class actions brought under Securities and Exchange Commission Rule 10b-5,

> [t]he potential for abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may ... exist ... to a greater extent than they do in other litigation. [In these cases,] the mere existence of an unresolved lawsuit has settlement value to the plaintiff, not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial. *Id.*, at 742-43.

To the extent that the Federal Rules and the discovery process are used for the purpose of harassment, they are a "social cost rather than a benefit." Thus, the Court urged

trial courts to use motions to dismiss and motions for summary judgment to prevent this occurrence. *Id.*

Blue Chip Stamps echoes far beyond the narrow context in which it arose. The very same potential for the abuses of discovery described by the Court in Rule 10b-5 cases exists in private antitrust cases, where the burdens of discovery and disruption of normal business activities are tremendous and the incentive to bring groundless claims in hopes of extracting a settlement are substantial. *See, e.g., Reiter v. Sonotone*, 442 U.S. 330, 345 (1979) (discussing the need to "exercise sound discretion and use the tools available" to exclude meritless antitrust claims).

The laxity of the Second Circuit's pleading standard will inevitably lead companies to second-guess their business decisions and to ask (1) whether other competitors have made the same or similar decisions and (2) if so, whether the likely benefits of the decision outweigh the likely cost of defending an antitrust case through at least the summary judgment stage of litigation. As discussed above, that litigation "penalty" can be very substantial. It seems inevitable, therefore, that the Second Circuit's decision will skew business decisions, leading firms to forego innovative and procompetitive business opportunities or activities that they would otherwise explore. Competition and consumers cannot help but suffer.

In *Monsanto*, this concern motivated the Court's ruling that a plaintiff must adduce evidence regarding "plus factors" to survive a motion for summary judgment. *Monsanto*, 465 U.S. at 763-4. For the same reasons, it is appropriate to dismiss Section 1 complaints that rely solely on allegations of parallel conduct and do not allege any supporting facts that

would "tend to exclude the possibility of independent action." *See id*.[14]

III. THE SECOND CIRCUIT'S HOLDING CONFLICTS WITH THE LAW OF OTHER CIRCUITS AND IGNORES GOVERNING PRECEDENT OF THIS COURT.

Given these aspects of complex antitrust litigation, it is not surprising that courts in other circuits have concluded that "plus factors" must be alleged in support of antitrust claims predicated on parallel conduct.[15] Those cases, in contrast to the Second Circuit's decision in this case, are consistent with this Court's prior decisions regarding parallel conduct. As discussed above, this Court has repeatedly stated that parallel conduct, standing alone, cannot form the

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[14] Other courts have justified requiring plaintiffs to allege other elements of their antitrust claims with some particularity by citing, *inter alia*, the particularly high cost of discovery in antitrust cases. *See, e.g.*, *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984) (requiring allegations of fact which at least outline or adumbrate a violation of the Sherman Act because "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery ... when the requisite elements are lacking."); *Garshman v. Universal Res. Holding, Inc.*, 641 F. Supp. 1359, 1367 (D.N.J. 1986)("the heavy costs of modern federal litigation, especially antitrust litigation, and the mounting caseload pressure on the federal courts," militate in favor of requiring some reasonable particularity in pleading violations of the federal antitrust laws.") (quoting, as does *Car Carriers, Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984)).

[15] *See Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989) (requiring "plus factors" to be pleaded in support of a conscious parallelism claim); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 475 (6th Cir. 2005)(same); *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999) (requiring allegations of "plus factors" or other facts in support of antitrust conspiracy claim).

basis for an antitrust violation.[16] The deep and abiding split among the circuits can only be resolved by this Court.

The Court should grant the petition for a writ of certiorari to bring the Second Circuit's law into line with the law of the First, Sixth and Tenth Circuits and with the rationale of this Court's prior decisions dealing with parallel conduct.

CONCLUSION

Review by this Court is necessary to ensure that the Second Circuit's error in failing to require allegations of "plus factors" in antitrust cases challenging "consciously parallel" conduct does not burden the amici, other U.S. businesses and the courts with a rash of meritless antitrust claims, nor chill procompetitive independent conduct by businesses operating in all U.S. industries.

Respectfully submitted,

DONALD C. KLAWITER
Counsel of Record
J. CLAYTON EVERETT, JR.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 739-3000

Counsel for Amici Curiae

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[16] *See Theatre Enters.*, 346 U.S. at 541 ("But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."); *Brooke Group*, 509 U.S. at 227 ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.").

THOMAS L. SAGER
Vice President, Assistant General Counsel and Director of Litigation
RAYMOND M. RIPPLE
E.I. du Pont de Nemours and Co.
1007 Market St.
Wilmington, DE 19898

Counsel for Amicus Curiae
E.I. du Pont de Nemours and Co.

QUENTIN RIEGEL
Vice President Litigation & Deputy General Counsel
National Association of Manufacturers
1331 Pennsylvania Ave., NW
6th Floor
Washington, DC 20004

Counsel for Amicus Curiae
National Association of Manufacturers

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